

23 December 1976

MEMORANDUM FOR: Office of General Counsel

STATINTL

ATTENTION : [redacted]

THROUGH : Assistant for Information, DDA

STATINTL

FROM : [redacted]
Chief, Information Systems Analysis Staff

SUBJECT : Amendment of CIA Freedom of Information
Regulations, 32 Code of Federal Regulations,
section 1900

REFERENCE : OGC 76-7075, 10 December 1976

1. This staff has received the reference to ensure that the proposed amendment conforms to the format required for publication in the Federal Register.

2. In reviewing the reference, we note that 32 CFR section 1900.3(g), which defines "records," does not include the term "machine readable materials" immediately after "photographs," as required by section 4 of P.L. 94-575.

3. We suggest the addition of the term "machine readable materials" also be included as an amendment to CFR section 1900.3(g).

[redacted]

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DDA/ISAS/RAB/[redacted] ad 12-23-76

OGC 76-7075
10 December 1976

MEMORANDUM FOR : Chief, Information and Privacy Staff ✓
Assistant for Information, DDA
Chief, ISS/PICG
ISS/PICG/AL
Attention:
THROUGH : Chief, Freedom of Information and Privacy
Law Division, Office of General Counsel
FROM :
Office of General Counsel
SUBJECT : (1) Freedom of Information Processing
of Documents of Other Agencies
(2) Amendment of CIA Freedom of Information
Regulations, 32 Code of Federal Regulations,
section 1900

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1. Since the 1974 amendments to the Freedom of Information Act, substantial consideration has been given to the manner in which the Agency shall effect Freedom of Information Act processing of documents of other agencies.

2. Currently, our "Third Agency Rule" operates as follows when documents originated by another agency are discovered pursuant to a Freedom of Information request:

- a. The requester is notified in the initial response that n documents originated by XYZ agency were discovered.
- b. He is further notified that he may expect a direct response from XYZ agency.

c. XYZ agency is notified by letter or telephone.

3. If a given requester should subsequently file suit, the referred documents are not objects of the litigation; however, the court and plaintiff (again) are notified of their existence and referral.

4. An inconsistency emerges when the CIA Freedom of Information Act Regulations, specifically 32 Code of Federal Regulations section 1900.3(g) are examined:

(g) "records," with reference to records of the Central Intelligence Agency, includes all papers, maps, photographs and other documentary materials regardless of physical form or characteristics made or received by the Central Intelligence Agency in pursuance of federal law or in connection with the transaction of public business and appropriate for preservation by the Central Intelligence Agency as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the Agency or because of the informational value of data contained therein. But the term does not include:

- (a) index, filing and museum documents made or acquired and preserved solely for reference, indexing, filing or exhibition purposes;
- (b) routing and transmittal sheets and notes and filing instructions and notes which do not also include information, comment or statement of substance or policy;
- (c) books, newspapers, magazines and similar publications and clippings and excerpts from any such publications;
- (d) documents and records prepared or originated by an agency other than the Central Intelligence Agency;
- (e) documents and records furnished by foreign governments or international organizations and held by the Central Intelligence Agency on the understanding that the information therein or the furnishing thereof be kept in confidence.

5. We should note, at this point, that both the Freedom of Information Act, 5 U.S.C. (6)(B)(iii), and the Attorney General's 1974 Memorandum on the Freedom of Information Act recognize the necessity for and propriety of inter-agency consultation when more than the holding agency has an interest in the document.

6. On 12 July of this year, Judge Bryant of the United States District Court for District of Columbia in Tax Reform Research Group, et al. v. Internal Revenue Service handed down a Memorandum and Order which, we feel, necessitates a modification to our regulations. In this Freedom of Information case, the plaintiffs and their attorney (Mr. Dobrovir) sought certain documents relevant to the Nixon White House-Internal Revenue Service conspiracy. The Internal Revenue Service withheld certain of these documents on the grounds, inter alia, that they were not "identifiable agency records of the Internal Revenue Service" since they were originated by the White House. The Service further claimed that the documents were no longer in their possession.

7. Judge Bryant found these contentions without merit and held:

"the structure and purposes of the [Freedom of Information] Act operate to foreclose defendant's claim that these memoranda do not constitute agency records subject to the Act's disclosure requirements. ... Nor is it decisive that the documents were generated by the White House rather than the Internal Revenue Service. Agencies often utilize or receive copies of documents generated in other agencies, and such documents, if identifiable, are clearly agency records for the purposes of the Act."
[Emphasis added]

Judge Bryant continued by holding:

"Finally in this regard, the fact that the Service returned the documents to the Justice Department ... does not exempt them from disclosure That the agency may no longer be in physical possession of the records ... is not determinative ... if the Agency knows what records a given request is directed towards, knows where the records are located, and is able to produce them, the Act requires that it do so."

8. Therefore, the Office of General Counsel is of the opinion that while our Third Agency Rule is both reasonable and legally supportable, there is a substantial risk in not conforming our regulations to our practices.

9. Accordingly, the Office of General Counsel recommends the following modifications to 32 Code of Federal Regulations part 1900:

section 1900.3(g)(4) ^{DELETION} delete

section 1900.3(g)(5) ^{OR} ^{REVOCATION} delete

section 1900.11(d) ^{REVISION} replace with the following:

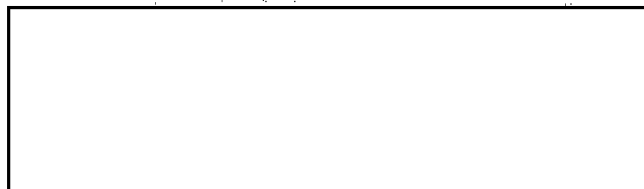
"Any request or communication to an agency other than the Central Intelligence Agency which requests or concerns documents or records originated by the CIA and is transferred by that agency to the CIA shall be considered a Freedom of Information request to the CIA for that referred document as of date of receipt by the CIA of the referral and shall be processed pursuant to regulations."

ADD

section 1900.43(c) add the following:

"In the event located records are determined to have originated with another government agency, the Coordinator shall notify the requester of such fact and shall expeditiously forward such records or a description thereof to the originating agency for their determination and direct response to the requester."

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